Supreme Court, U.S.
FILED

001415 MAR - 8 2001

OFFICE OF THE CLERK

No. 00-

IN THE

Supreme Court of the United States

AZALEA SMARTT,

Petitioner,

v.

PAUL O'NEILL, Secretary of the U.S. Department of Treasury, in his official capacity,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DAVID L. ROSS
ROSS, ROSE & HAMMILL, LLP
Attorneys for Petitioner
8383 Wilshire Blvd., Suite 634
Beverly Hills, CA 90211
(323) 653-7724

165660

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

What are the circumstances in which an employment discrimination plaintiff, after submitting evidence establishing a prima facie case and evidence from which a rational factfinder could conclude that the employer's proffered explanation for its actions was false, can receive an inference of discrimination on the part of the employer.

Whether an African-American female employment discrimination plaintiff who presents a prima facie case and who submits evidence that the supervisor who influenced the decision-maker and who made racially derogatory remarks, including "*igger", during the time period at issue, along with evidence that the employer proffered a false reason to justify its action, can survive a motion for judgment as a matter of law.

PARTIES TO THE PROCEEDING

Petitioner is Azalea Smartt.

Respondent is Paul O'Neill, Secretary of the U.S. Department of Treasury, in his official capacity. At the time of the proceedings began, Robert E. Rubin was the Secretary of the U.S. Department of Treasury, and, as such, was sued in his official capacity. Subsequently, Lawrence H. Summers became the Secretary of the U.S. Department of Treasury. F.R.C.P. 25(d).

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Cited Authorities	iv
Table of Appendices	v
Opinions Below	1
Statement of Jurisdiction	1
Statement of the Case	1
A. Newly Discovered Evidence to Disbelieve Employer's Nondiscriminatory Explanation For Its Decision.	3
B. Proceedings Below.	4
Reasons for Granting the Writ	4
I. The Court Of Appeals, Fifth Circuit, Ignored The Supreme Court's Decision In *Reeves*.	4
1. Petitioner Presented Evidence of a Prima Facie Case.	6
2. Petitioner Presented Evidence that the Employer's Proffered Explanation for its Action was False.	6
II. The Circuit Courts Need Clarification	10
Conclusion	13

TABLE OF CITED AUTHORITIES

Page

Cases:

Fisher v. Vasser College, 114 F.3d 1332 (CA2 1997), *cert. denied*, 522 U.S. 1075, 139 L. Ed. 2d 752, 118 S. Ct. 851 (1998) 12

Reeves v. Sanderson, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) ..... *passim*

Willis v. Marion Cty. Auditor's Office, 118 F.3d 542 (7th Cir. 1997) 7

Statute:

28 U.S.C. § 1254 1

Rules:

Fifth Circuit Rule 47.6 10

F.R.C.P. 25(d) ii

TABLE OF APPENDICES

Page

Appendix A — Per Curiam Order Of The United States Court Of Appeals Dated And Filed December 8, 2000 ..... 1a

Appendix B — Order And Judgment Of The United States District Court For The Western District Of Texas, San Antonio Division Dated And Filed October 26, 1999 ..... 2a

Appendix C — Order Of The United States District Court For The Western District Of Texas, San Antonio Division, Regarding Post-Judgment Motions Dated And Filed January 4, 2000 ..... 27a

Appendix D — Motion To Supplement Record Dated July 31, 2000 ..... 35a

Appendix E — Order Of The United States Court Of Appeals For The Fifth Circuit Granting Motion To Supplement Record Dated And Filed September 6, 2000 ..... 41a

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Fifth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Fifth Circuit Opinion is not reported, and is attached hereto as Appendix A.

STATEMENT OF JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on December 8, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

Petitioner alleged that she had been subjected to race and gender discrimination and retaliation consisting of placement on administrative leave, 5-day suspension, and transfer. Petitioner also asserted claims of hostile work environment and unequal work assignments.

In May 1995, while Petitioner, an African-American female, was out of town in connection with her employment as a Special Agent at Customs ("SAC"), her minor son broke into her home and took her service revolver from a locked bedroom drawer. When Petitioner learned that her gun was missing and that her son had thrown the gun out of his car while being chased by the police, she immediately notified her superior at Customs, San Antonio, SAC, Leonardo Lindheim ("Lindheim") and the local police. Ultimately, the gun was recovered.

Thereafter, Lindheim stripped Petitioner of her weapon. Then, Lindheim placed Petitioner on administrative leave with pay for 8 months, retrieving all of Petitioner's materials, including Petitioner's weapons and credentials. When Petitioner returned to duty, she was not allowed to work on any cases. Shortly thereafter, Lindheim's supervisor, Mr. Edgar Adamson ("Adamson"), proposed to suspend Petitioner for 30 days and to transfer Petitioner out of San Antonio for "being associated with a person involved in criminal activity," her son. The transfer required Petitioner to move to San Diego where she was assigned to a desk job, prohibited from working on active cases, and stripped of her other rights, duties and privileges as a Special Agent.

Similarly situated non-African-American males who had children who were "involved in criminal activity" were treated differently than Petitioner. For example, Mr. Mark Duke, a white male, had a son who was arrested for selling drugs to a DEA agent and who served 6 months in a federal penitentiary. No action was taken against Mr. Duke. And no action was taken against Mr. Doug Krockenburger, another white male, after his son was arrested for smuggling 100 pounds of marijuana through the Port of Entry. Additionally, the son of Agent Joseph Cisneros had "numerous run-ins with the law." No action was ever taken against Mr. Cisneros for "being associated with a person involved in criminal activity," also his son. No action was taken against these similarly situated male employees for "being associated with a person involved in criminal activity," and none of them were forced to transfer away from their non-African-American children.

The fact that Petitioner was singled out for harsher treatment than non-African-American male employees is evidence from which a rational factfinder could conclude

that the employer's proffered explanation for its action was false. Nonetheless, the United States District Court, Western District of Texas, San Antonio Division, granted Respondent's Motion for Summary Judgment. The Order was dated and filed on October 26, 1999. (App. B)

A. Newly Discovered Evidence to Disbelieve Employer's Nondiscriminatory Explanation For Its Decision.

Shortly after the District Court granted Respondent's Motion for Summary Judgment, Petitioner discovered additional evidence that would cause a factfinder to disbelieve Respondent's explanation for its adverse treatment of Petitioner.

Although Petitioner presented evidence in her Response to the Motion for Summary Judgment that Lindheim was an individual known to have a strong dislike for black people and other minorities, Petitioner did not know that Respondent had a sworn affidavit regarding an on-going investigation of Lindheim for racial discrimination. In addition, the affidavit indicated that Lindheim referred to blacks as "Niggers." This on-going investigation occurred during the time in which Lindheim took adverse actions against Petitioner.

Immediately after discovering this new evidence, Petitioner filed a Motion for Reconsideration based thereon.

While on appeal, the Petitioner was granted the right to supplement the appellate record with a copy of Customs' internal investigation report substantiating Lindheim's racially motivated acts.

B. Proceedings Below.

On January 4, 2000, the District Court denied Petitioner's Motion for Reconsideration and to Deny Defendant Costs, Or In the Alternative, Stay Taxing of Costs Pending Plaintiff's Motion for Reconsideration and Appeal Based on Newly Discovered Evidence. (App. C)

Petitioner appealed both decisions before the United States Court of Appeals, Fifth Circuit. On February 29, 2000, the Fifth Circuit granted Petitioner's Motion to Consolidate.

On July 31, 2000, Petitioner filed a Motion to Supplement Record on Appeal. (App. D) An order granting Petitioner's Motion to Supplement Record on Appeal was filed September 6, 2000. (App. E)

On December 8, 2000, in a one-word decision, the Fifth Circuit affirmed the District Court's decisions affirming Summary Judgment and denying Reconsideration. (App. A)

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS, FIFTH CIRCUIT, IGNORED THE SUPREME COURT'S DECISION IN *REEVES*.

In *Reeves v. Sanderson*, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000), a unanimous Supreme Court stated the applicable standard of evidence necessary for an employment discrimination plaintiff to survive a judgment as a matter of law:

> . . . an employment discrimination plaintiff may survive judgment as a matter of law by submitting two categories of evidence: first, evidence establishing a "prima facie case," as that term is used in *McDonald Douglas Corp. v. Green*, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973); and second, evidence from which a rational factfinder could conclude that the employer's proffered explanation for its actions was false.

Reeves at p. 2112. The Supreme Court held in *Reeves* that the Court of Appeals "plainly, and erroneously, required the plaintiff to offer some evidence beyond those two categories." *Reeves* at p. 2112.

The same is true in the instant case. The Court of Appeals, Fifth Circuit, the same Circuit from which *Reeves* arose, affirmed the District Court's granting of Respondent's Motion for Summary Judgment wherein the judge "plainly, and erroneously, required the plaintiff to offer some evidence beyond those two categories." In addition, the Fifth Circuit also affirmed the District Court's denial of Petitioner's Motion for Reconsideration and Appeal Based on Newly Discovered Evidence.

In so ruling, the District Court did not have the benefit of the unanimous *Reeves* decision. *Reeves* was argued on March 21, 2000 and decided on June 12, 2000. The District Court granted Respondent's Motion for Summary Judgment on October 26, 1999. (App. A) The District Court denied Petitioner's Motion for Reconsideration and Appeal Based on Newly Discovered Evidence on January 4, 2000. (App. B)

However, the Fifth Circuit did have the benefit of *Reeves*. Nonetheless, the Court of Appeals still affirmed the lower court's decisions. As in *Reeves*, the Petitioner in the instant case presented a "prima facie case" and evidence that the employer's proffered explanation for its action was false. However, the Petitioner's evidence that Customs' proffered explanation for its actions was false was far more convincing than the evidence the plaintiff presented in *Reeves*.

1. Petitioner Presented Evidence of a Prima Facie Case.

In the first category, an employment discrimination plaintiff, in order to survive judgment as a matter of law, must submit evidence establishing a "prima facie case." *Reeves* at p. 2112. In its decision granting Respondent's Motion for Summary Judgment, the District Court found that "Special Agent Smartt established a prima facie case of discrimination in regards to her suspension and transfer."

2. Petitioner Presented Evidence that the Employer's Proffered Explanation for its Action was False.

In the second category, an employment discrimination plaintiff, in order to survive judgment as a matter of law, must submit evidence from which a rational factfinder could conclude that the employer's proffered explanation for its actions was false. *Reeves* at p. 2112. In its decision granting Respondent's Motion for Summary Judgment, the District Court "misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence." *Reeves* at p. 2108. In fact, under *Reeves*, the petitioner had introduced sufficient evidence to sustain the jury's finding of unlawful discrimination.

In the instant case, Petitioner submitted evidence from which a rational factfinder could conclude that the employer's proffered explanation for its actions was false. Petitioner contended that, although the ultimate decision-maker, Mr. Adamson, was without 'discriminatory animus', he was adversely influenced by two individuals, Robert Butler ("Butler") and Lindheim. Petitioner presented evidence that both Butler and Lindheim harbored discriminatory animus toward African-Americans in general, and thus toward Petitioner. Lindheim was not only the highest ranking Special Agent in the entire District, but he was also Petitioner's third line supervisor.

Citing *Willis v. Marion Cty. Auditor's Office*, 118 F.3d 542, 547 (7th Cir. 1997), the District Court correctly found that it may impute a discriminatory or retaliatory motive to Mr. Adamson as the decision-maker if an employee with a discriminatory motive, such as Butler and Lindheim, manipulates or unduly influences the decision-making process. Nonetheless, the District Court misconceived the evidentiary burden to be borne by plaintiffs attempting to prove intentional discrimination through indirect evidence.

In regards to Butler, the District Court assumed that the information he provided was "biased and untrue." In regards to Lindheim, the District Court stated as follows:

> It is undisputed that Mr. Adamson called SAC Lindheim on August 27, 1996, and during the conversation, ASC Lindheim told Mr. Adamson that Special Agent Smartt must be transferred. The Court assumes for the purposes of analysis that the reasons given by SAC Lindheim were false.

The District Court concluded "that there is a question of material fact regarding whether SAC Lindheim influenced Mr. Adamson."

Nonetheless, after finding that there was a question of material fact regarding whether Lindheim influenced Mr. Adamson, the District Court desired more evidence of discrimination. It required Petitioner to show that the action of providing the biased and untrue information by both Butler and Lindheim "were motivated by a discriminatory animus."

The District Court completely ignored testimony of statements made by Lindheim during 1991-1993 period that he had a strong dislike for African-Americans and faulted Petitioners for her failure to "provide evidence of any statements that are proximate in time to Special Agent Smartt's suspension and transfer." The District Court concluded that Petitioner's evidence was "insufficient to prove that SAC Lindheim acted with discriminatory intent."

In misconceiving the evidentiary burden borne by plaintiffs attempting to prove intentional discrimination through indirect evidence, the District Court held that "[a]ny such influence that SAC [Lindheim] may have had on Mr. Adamson's decision must be shown to have been motivated by discrimination or retaliation in order for Special Agent Smartt to overcome summary judgment."

However, in Petitioner's Motion for Reconsideration the District Court was presented with additional evidence that Lindheim made statements regarding his strong dislike for African-Americans that were "proximate in time to Special Agent Smartt's suspension and transfer." Nonetheless, the District court once again chose to ignore this evidence.

Without the benefit of *Reeves*, the District Court understandably misconceived the evidentiary burden borne by plaintiffs attempting to prove intentional discrimination through indirect evidence. The District Court required the Petitioner to submit evidence beyond the two categories of evidence outlined in *Reeves* ("prima facie case" and "evidence from which a rational factfinder could conclude that the employer's proffered explanation for its actions were false") in order to survive the Respondent's Motion for Summary Judgment. Because the District Court "plainly, and erroneously, required the [Petitioner] to offer some evidence beyond those two categories", as established under *Reeves*, the Court of Appeals should have reversed the decision and let the jury decide. "The ultimate question of liability should not be taken from the jury once the plaintiff has introduced the two categories of evidence." *Reeves* at p. 2112.

However, with the benefit of *Reeves*, it is difficult to understand how the Court of Appeals for the Fifth Circuit "misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence." *Reeves* at p. 2108. While on appeal, the Petitioner supplemented the appellate record with additional evidence of discriminatory intent. This consisted of a copy of the employer's own internal investigation report substantiating that Lindheim committed acts of racial animus toward African-Americans during the time period of the instant matter. Petitioner clearly submitted "evidence from which a rational factfinder could conclude that the employer's proffered explanation for its actions was false" and motivated by a desire to discriminate against the Petitioner because of her race. *Reeves* at p. 2112.

Notwithstanding the unanimous Supreme Court precedent in *Reeves*, on December 8, 2000, the Court of Appeals, issued its decision: "AFFIRMED."[1]

II.

THE CIRCUIT COURTS NEED CLARIFICATION

In her concurring opinion, Justice Ginsburg wrote "it may be incumbent on the Court, in an appropriate case, to define more precisely the circumstances in which plaintiffs will be required to submit evidence beyond these two

---

1. In Affirming the District Court's decisions regarding the Motion For Summary Judgment ruling, as well as the Motion for Reconsideration and Appeal Based on Newly Discovered Evidence, the Fifth Circuit wrote "AFFIRMED. *See* 5th Circuit Rule 47.6." 5th Cir R. 47.6 states as follows:

> **47.6 Affirmance Without Opinion.** The judgment or order may be affirmed or enforced without opinion when the court determines that an opinion would have no precedential value and that any one or more of the following circumstance exists and is dispositive of a matter submitted for decision: (1) that a judgment of the district court is based on findings of fact that are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; *(4) in the case of summary judgement, that no genuine issue of material fact has been properly raised by the appellant*; and *(5) no reversible error of law appears*. In such case, the court may, in its discretion, enter either of the following orders: "AFFIRMED. *See* 5th Cir R. 47.6." or "ENFORCED. See 5th Cir. R. 47.6." (emphasis added)

categories in order to survive a motion for judgement as a matter of law." *Reeves* at p. 2112. Justice Ginsburg went on to state:

> As the Court notes, it is a principle of evidence law that the jury is entitled to treat a party's dishonesty about a material fact as evidence of culpability. *Ante*, at 12. Under this commonsense principle, evidence suggesting that a defendant accused of illegal discrimination has chosen to give a false explanation for its actions gives rise to a rational inference that the defendant could be masking its actual, illegal motivation. Ibid. **Whether the defendant was in fact motivated by discrimination is of course for the factfinder to decide; that is the lesson of *St. Mary's Honor Center v. Hicks*, 509 U.S. 503 125 L. Ed 2d 407, 113 S.Ct. 2742 (1993).** But the inference remains — unless it is conclusively demonstrated, by evidence the district court is required to credit on a motion for judgment as a matter of law, see ante, at 15-16, that discrimination could not have been the defendant's true motivation. ***If such conclusive demonstrations are (as I suspect) atypical, it follows that the ultimate question of liability ordinarily should not be taken from the jury once the plaintiff has introduced the two categories of evidence above.*** *Because the Court's opinion leaves room for such further elaboration in an appropriate case*, I join it in full. *Reeves*, id at p. 2112. (emphasis added)

The instant case is "the appropriate case" for the "further elaboration" of which Justice Ginsburg refers.

The Petitioner submitted the two categories of evidence needed to survive judgment as a matter of law. Therefore, the Court of Appeals should have reversed the District Court's decisions. At the very least, the Court of Appeals should have explained why its decision was consistent with *Reeves*. The Court of Appeals did neither.

Prior to *Reeves*, there existed among the circuits a divergence of opinion regarding the standard of evidentiary proof necessary to overcome a Motion for Summary Judgment. *See Fisher v. Vasser College*, 114 F.3d 1332 (CA2 1997) (en banc) (plaintiff must introduce sufficient evidence for jury to find both that employer's reason was false and that real reason was discrimination), *cert. denied*, 522 U.S. 1075, 139 L. Ed. 2d 752, 118 S. Ct. 851 (1998). According to the majority opinion, the Supreme Court granted certiorari "to resolve [the] conflict among the Court of Appeals." From its one word ruling, it is obvious that the Court of Appeals for the Fifth Circuit did not understand the ruling in *Reeves*. If the Fifth Circuit, the Circuit from which the *Reeves* case arose, has difficulty in understanding the Supreme Court's ruling, then the Supreme Court should take this opportunity "to define more precisely the circumstances in which plaintiffs will be required to submit evidence beyond these two categories in order to survive a motion for judgement as a matter of law," as Justice Ginsberg suggests. *Reeves* at p. 2112.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID L. ROSS
ROSS, ROSE & HAMMILL, LLP
Attorneys for Petitioner
8383 Wilshire Blvd., Suite 634
Beverly Hills, CA 90211
(323) 653-7724

APPENDIX

APPENDIX A — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS DATED AND FILED DECEMBER 8, 2000

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-51054
consolidated with No. 00-50061

AZALEA SMARTT

Plaintiff – Appellant,

versus

LAWRENCE H. SUMMERS,
Secretary of United States Department of Treasury,
in his Official Capacity as Agency Head

Defendant – Appellee.

Appeals from the United States District Court
for the Western District of Texas
(SA-98-CV-990)

Before BARKSDALE, EMILIO M. GARZA and BENAVIDES, Circuit Judges.

PER CURIAM:*

AFFIRMED. See 5th Circuit Rule 47.6.

---

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

APPENDIX B — ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION DATED AND FILED OCTOBER 26, 1999

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL NO. SA-98-CA-990-JWP

AZALEA SMARTT,

Plaintiff,

v.

ROBERT E. RUBIN,
Secretary of the Treasury,

Defendant.

ORDER

Plaintiff Azalea Smartt alleges that she has been subjected to race, gender and retaliation discrimination in the form of her placement on administrative leave, 5-day suspension, and transfer. She also asserts claims of hostile work environment and unequal work assignments. Before the Court is defendant's motion for summary judgment. Docket no. 34. The Court finds that plaintiff failed to exhaust her administrative remedies in regard to her claims of hostile work environment and unequal work assignments. The Court also finds that plaintiff cannot establish a prima facie case

of discrimination in regard to her 8-month administrative leave with pay because she cannot show that she was treated differently from a similarly-situated person of a different race or gender. Further, the Court finds that plaintiff cannot prove her claims of race, gender and retaliation discrimination based on her suspension and transfer because she cannot show that the deciding official was influenced by two individuals, both of whom allegedly dislike blacks and one of whom knew about her prior EEO activity. Therefore, the Court will grant the motion for summary judgment in its entirety and dismiss this case.

Background

Except as noted, the relevant facts of this case are not in dispute. Plaintiff Azalea Smartt is a special agent with the U.S. Customs Service (USCS). On May 18, 1995, while Special Agent Smartt was away on training with the USCS, Messiah Smartt, her son who was 18 years old at the time, stole her USCS-issued semi-automatic pistol. By that time, Messiah had an extensive record of arrests and convictions. Upon questioning by Special Agent Smartt, Messiah informed her that he stole the weapon and discarded it during a police chase on May 18, 1995. On May 19, 1995, Special Agent Smartt reported the theft of her weapon, and her weapon was recovered later that day.

An investigation by the USCS Office of Internal Affairs was initiated regarding the theft of Special Agent Smartt's pistol. The investigation initially revealed at least 18 unauthorized queries by Special Agent Smartt of family members in three secured law enforcement data bases to

which Customs Special Agents were granted access. Based on the unauthorized queries, the USCS placed Special Agent Smartt on administrative leave on July 28, 1995, pending the Internal Affairs investigation. On January 22, 1996, Special Agent Smartt filed an administrative complaint of discrimination charging that she was placed on administrative leave because of her race and gender. The administrative leave lasted eight months, and Special Agent Smartt was ordered back to work in April 1996.

Special Agent Smartt was provided notice by a letter dated May 17, 1996, from Reginald Seymour, Resident Special Agent in Charge in Baton Rouge, Louisiana, that he proposed that she be suspended for 30 days and reassigned to a position to be determined at a later date. Mr. Edgar Adamson, the chair of the Customs Disciplinary Review Board, reviewed the administrative record, and on August 26, 1996, conducted a telephonic hearing during which Special Agent Smartt and her attorney had an opportunity to respond to the charges. On February 17, 1997, Mr. Adamson decided that Special Agent Smartt should be suspended for five days and transferred away from San Antonio. The stated basis for this action was that (1) Special Agent Smartt continued to live with her son, an admitted member of the "Bloods", a criminal organization, well-known to the law enforcement community, and (2) her unauthorized use of law enforcement data bases to query names of family members. Mr. Adamson found that Special Agent Smartt failed to take proper precautions to ensure the security of her weapon, which was taken by her son, but that she promptly reported the loss of the weapon and provided information to enable authorities to recover the weapon quickly.

Appendix B

Mr. Adamson was the sole deciding official responsible for the decision that resulted in Special Agent Smartt's suspension and transfer. The USCS Office of Human Resources informed Special Agent Smartt in a letter dated February 25, 1997, of the decision to suspend her and to reassign her from San Antonio. In March 1997, Special Agent Smartt was given a 5-day suspension, and in the summer of 1997, she was transferred from Texas to San Diego, California.

On April 10, 1997, Special Agent Smartt filed an administrative complaint of discrimination. In a letter dated April 22, 1997, the Regional Complaints Center of the Department of the Treasury issued a letter to Special Agent Smartt's counsel to inform him that the following two issues were accepted for investigation:

> 1) Whether management suspended you for 5 days (March 3-7, 1997) because of your sex (female), race (Black), or reprisal for your involvement in the EEO complaints process;
>
> 2) Whether you are being transferred to San Diego, CA, because of your sex (female), race (Black) or as reprisal for your involvement in the EEO complaints process.

Mot. S/J, Exh. 2. Special Agent Smartt admitted in an affidavit that Mr. Adamson acted in good faith and free of discriminatory or retaliatory animus when he made his decision. ***Mot. S/J***, Exh. 2, Smartt Aff. (attached to April 22, 1997 letter from Regional Complaint Center). However,

Appendix B

Special Agent Smartt asserts claims of discrimination because Mr. Adamson's decision was allegedly influenced by both Special Agent Robert Butler and Leonard Lindheim, the San Antonio Special Agent in Charge ("SAC"). Special Agent Butler, a co-worker who allegedly exhibited a dislike for Blacks, was involved in investigating Special Agent Smartt. SAC Lindheim, a supervisor of Special Agent Smartt who knew about her prior EEO activity and who allegedly dislikes Blacks, talked with Mr. Adamson on August 27, 1996, at which time he stated that Special Agent Smartt must be transferred from San Antonio.

In addition to the claims of race, gender and retaliation discrimination, Special Agent Smartt asserts claims of hostile work environment and unequal work assignments. The basis for the hostile work environment claim is that (1) Special Agent Butler submitted information and/or allegations that were a part of the Internal Affairs investigation of Special Agent Smartt; and (2) SAC Lindheim told Mr. Adamson that Special Agent Smartt needed to be transferred. Thus, the basis for the hostile work environment claim is based on the same facts as the race, gender and retaliation discrimination claims. As to the claim for unequal work assignments, Special Agent Smartt points out that she was not allowed to work on active cases when she returned to work after her administrative leave.

Summary Judgment

Federal Rule of Civil Procedure 56(b) provides that a defending party may, at any time, move with or without supporting affidavits for a summary judgment in the party's

favor. Summary judgment shall be rendered if the pleadings and evidence show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion, and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. ***Celotex Corp. v. Catrett***, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). The party opposing a motion must present affirmative evidence in order to defeat a properly supported motion for summary judgment. ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 257, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986). An adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue for trial; if he does not so respond, summary judgment, if appropriate, shall be entered against him. Fed.R.Civ.P. 56(e).

The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no ***genuine*** issue of ***material*** fact. ***Anderson***, 477 U.S. at 247-248, 106 S.Ct. at 2510. The dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. ***Id.*** All of the evidence and inferences drawn from that evidence must be viewed in the light most favorable to the party opposing the motion for summary Judgment. ***Hibernia National Bank v. Carner***, 997 F.2d 94, 97 (5th Cir. 1993).

Appendix B

Employment Discrimination

There are two methods for proving a claim of intentional employment discrimination. First, a claim may be established by presenting direct evidence of discrimination. Second, the indirect method of proof set forth in ***McDonnell Douglas Corp. v. Green***, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973), can be used when only circumstantial evidence is available. ***Daigle v. Liberty Life Ins. Co.***, 70 F.3d 394, 396 (5th Cir.1995). This is an indirect evidence case.

The indirect method of proof in an employment discrimination case requires that a plaintiff carry the initial burden of proving by the preponderance of the evidence a prima facie case of discrimination. ***Patterson v. McLean Credit Union***, 491 U.S. 164, 186, 109 S.Ct. 2363, 2378, 105 L.Ed.2d 132 (1989); ***Texas Department of Community Affairs v. Burdine***, 450 U.S. 248, 252-253, 101 S.Ct. 1089, 1093-94, 67 L.Ed.2d 207 (1981). If the plaintiff establishes a prima facie case, a rebuttable presumption arises that the employer unlawfully discriminated. ***Patterson***, 491 U.S. at 187, 109 S.Ct. at 2378; ***Burdine***, 450 U.S. at 254, 101 S.Ct. at 1094. The burden then shifts to the defendant to present evidence that the plaintiff was treated in a certain way for a legitimate, nondiscriminatory reason. ***Id.*** If this burden is met, the presumption disappears and the plaintiff has the opportunity to prove that the reason articulated by the employer was a mere pretext for discrimination. ***Patterson***, 491 U.S. at 187, 109 S.Ct. at 2378; ***Burdine***, 450 U.S. at 256, 101 S.Ct. at 1095.

Appendix B

For purposes of proving pretext, it is not enough, to show that the stated reason was false; plaintiff must show both that the stated reason was false and that discrimination was the actual reason for the adverse employment action. ***St. Mary's Honor Center v. Hicks***, 509 U.S. 502, 516-17, 113 S.Ct. 2742, 2752, 125 L.Ed.2d 407 (1993). The plaintiff retains the burden of persuading the fact-finder of intentional discrimination. ***Id.***

The elements of a prima facie case of race or gender discrimination in discipline are (1) membership in a protected class, (2) an adverse disciplinary decision, and (3) harsher treatment than other similarly-situated, non-minority employees. ***See EEOC v. Brown & Root, Inc.***, 688 F.2d 338, 340-41 (5th Cir. 1982). In order to establish a prima facie case of retaliation, a plaintiff must show that (1) the plaintiff engaged in activity protected by Title VII, (2) an adverse employment action occurred, and (3) there was a causal connection between the participation in the protected activity and the adverse employment action. ***Long v. Eastfield College***, 88 F.3d 300, 304 (5th Cir.1996). Since the burden-shifting analysis applies to retaliation cases, once the plaintiff establishes a prima facie case, the defendant then has the burden to articulate a legitimate, non-retaliatory reason for the adverse employment action. ***Long***, 88 F.3d at 304-305. If the defendant articulates a non-retaliatory reason, then the plaintiff must establish that the conduct protected by Title VII was a "but for" cause of the adverse employment action. ***Id.*** at 305 n.4.

Appendix B

Discussion

A. Claims of Hostile Work Environment and Unequal Assignments

Defendant contends that summary judgment is appropriate as to the claims for hostile work environment and unequal work assignments because Special Agent Smartt did not exhaust her administrative remedies in regard to such claims. Special Agent Smartt contends that she exhausted her administrative remedies because she informed the EEO counselors that (1) her workplace was hostile to Black females, and (2) she was being subjected to unequal treatment in work assignments.

In regard to Special Agent Smartt's second administrative complaint of discrimination, the two issues accepted by the Regional Complaint Center (RCC) pertained to her suspension and transfer. The issues as framed by the RCC did not relate to the allegedly hostile work environment or unequal work assignments. The April 22, 1997 letter informing Special Agent Smartt's counsel of the issues accepted for investigation contained the following directive:

> If you disagree with the issues, please notify me in writing within five days of receipt of this letter. Please be clear and concise in your response. If no response is received, I will assume that you agree with the issues and will proceed with the investigation of the complaint.

Mot. S/J, Exh. 2. Special Agent Smartt's statement of contested facts states that she objected to the framing of the issues in her January 22, 1996 letter. ***Response***, Statement of Contested Facts, ¶ 1. That letter, however, pertained to the first administrative complaint of discrimination, which involved Special Agent Smartt's administrative leave.[1] In response to Special Agent Smartt's January 22 letter, the RCC sent her counsel a letter dated February 26, 1996, that framed the issue regarding Special Agent Smartt's placement on administrative leave. Special Agent Smartt's statement of contested facts does not indicate that she objected to the framing of the issues regarding her suspension and transfer as set forth in the April 22, 1997 letter to her counsel. Also, Special Agent Smartt failed to provide any evidence showing that she objected to the framing of the issues in regard to her suspension and transfer. Therefore, the Court finds that Special Agent Smartt did not object to the framing of the issues accepted by the RCC for investigation in regard to her second administrative complaint of discrimination.

It is well established that the timely filing of a discrimination charge is not a jurisdictional prerequisite to a lawsuit, but it is a requirement akin to a statute of limitations which is subject to waiver, estoppel, and equitable tolling. ***Zipes v. Trans World Airlines, Inc.***, 455 U.S. 385, 393, 102 S.Ct. 1127, 1132, 71 L.Ed.2d 234 (1982). The fundamental purpose of the charge is to trigger an investigation. The reasonable limits of an investigation

---

1. Any objection to the issue framed in regard to the first administrative complaint could not include the claims of hostile work environment and unequal work assignments because the basis of those claims occurred later in time.

potentially triggered by a charge of discrimination define the substantive limits of a subsequent Title VII action. The limits of a Title VII action are, therefore, limited to any kind of discrimination that is related to the charge's allegations, limited only by the scope of the investigation that could reasonably be expected to grow out of the initial charge of discrimination. ***Fine v. GAF Chemical Corp.***, 995 F.2d 576, 578 (5th Cir.1993).

Special Agent Smartt never submitted a complaint to the RCC regarding her claims of hostile work environment harassment and unequal work assignments. In regard to the second administrative complaint, the issues framed by the RCC pertain to her suspension and transfer. Despite the factual similarity between the hostile work environment claim and the discrimination claims, nothing in the issues framed by the RCC suggests that the scope of the investigation that could reasonably be expected to grow out of the issues framed by the RCC would have included claims for hostile work environment harassment and unequal work assignments. In fact, because of the similarity of facts and Special Agent Smartt's failure to object to the framing of the issues, the investigator had no reason to investigate any other claims.

In a case similar to ours, the Fifth Circuit Court of Appeals ruled that since the plaintiff never objected to the issues as stated by the RCC, the Court had to assume that the issues were correctly framed. ***Dollis v. Rubin***, 77 F.3d 777, 780 (5th Cir. 1995). On that basis, the Fifth Circuit held that summary judgment was appropriate as to those claims not included in the issues framed by the RCC because

the plaintiff did not exhaust her administrative remedies. ***Id.*** at 781. Therefore, the Court must find that Special Agent Smartt failed to satisfy the prerequisites for filing discrimination claims based on a hostile work environment and unequal work assignments. Accordingly, the Court must grant the motion for summary judgment as to those claims.

B. Discrimination Claim Based on Administrative Leave

The record evidence shows that the USCS placed Special Agent Smartt on administrative leave as a result of discovering her unauthorized use of various data bases in checking the criminal backgrounds of family members. In order to establish a prima facie case of discrimination as to this claim, Special Agent Smartt must show that USCS Special Agents who are not Black or female used the data bases without authorization and were not placed on administrative leave. Special Agent Smartt's response to the motion does not make any such showing. Therefore, the Court finds that the motion should be granted as to this claim due to Special Agent Smartt's failure to establish a prima facie case of discrimination.

C. Claims Based on 5-Day Suspension and Transfer to San Diego

Special Agent Smartt asserts claims of race, gender and retaliation discrimination in regard to her suspension and transfer to San Diego. She concedes that Mr. Adamson was the sole deciding official responsible for the decision that resulted in the suspension and transfer. ***Mot. S/J***, Exh. 2, Smartt Aff. (attached to April 22, 1997 letter from Regional

Complaint Center). Special Agent Smartt also concedes that during the administrative process, Mr. Adamson acted in good faith when he made his decision. ***Id.*** Special Agent Smartt contends that Mr. Adamson's decision was tainted by information provided by Special Agent Butler as part of the Internal Affairs investigation. Special Agent Smartt also contends that Mr. Adamson's decision was tainted by the statements made to Mr. Adamson by SAC Lindheim that Special Agent Smartt must be transferred because she "cannot effectively deal with other police agencies or the U.S. Attorney's Office," and that her "anti-police remarks have alienated others." ***Response***, Exh. F, Mr. Adamson's notes during phone call to Leonard Lindheim on August 27, 1996.

In his letter to Special Agent Smartt informing him of his decision to suspend and transfer her, Mr. Adamson found that (1) she engaged in conduct inconsistent with her position as a USCS law enforcement officer by allowing her son to live with her despite his criminal activity, (2) she failed to take proper and reasonable precautions to ensure the safety and security of the USCS pistol assigned to her by leaving it in her residence where her son would have access to it, and (3) without authorization, she used law enforcement data bases to query names of family members. ***Mot. S/J***, Exh. 4, Decision letter from Mr. Adamson. Defendant is correct that, in order for Special Agent Smartt to establish a prima facie case of discrimination, she must show that employees that are male or non-Black were treated differently under circumstances "nearly identical" to hers. ***Mayberry v. Vought Aircraft Co.***, 55 F.3d 1086, 1090 (5th Cir. 1995).

Appendix B

In an effort to establish a prima facie case, Special Agent Smartt has identified other USCS officers who have children who were sent to prison for drug offenses.[2] In those cases, the USCS officers were not similarly disciplined by the USCS. Defendant invites the Court to undertake a quantitative analysis of the criminal activity of Special Agent Smartt's son and the sons of the USCS officers that Special Agent Smartt identified. The prima facie burden is light it in comparison to the ultimate burden, and the Court is required to view the facts in the most favorable light to the plaintiff. Therefore, the Court finds that Special Agent Smartt established a prima facie case of discrimination in regard to her suspension and transfer.

The Court notes that Special Agent Smartt's claims of retaliation in regard to her suspension and transfer are predicated on SAC Lindheim's knowledge of her prior EEO activity. SAC Lindheim talked to Mr. Adamson about the transfer. However, Adamson testifies that he made the decision to suspend and transfer Smartt before he spoke with SAC Lindheim. ***Mot. S/J***, Exh. 3, Adamson Decl. Special Agent Smartt offers no evidence to the contrary. Thus, she cannot establish a prima facie case of retaliation discrimination. Despite this finding, the Court shall address the other evidentiary standards relevant to a discrimination claim for the benefit of a higher court which might disagree with the conclusion that no prima facie case has been shown.

Defendant has produced evidence that articulates nondiscriminatory reasons for the suspension and transfer,

---

2. It is acknowledged that Special Agent Smartt is a member of a protected group and that she suffered an adverse disciplinary action.

i.e., Special Agent Smartt engaged in conduct inconsistent with her position as a USCS law enforcement officer by failing to separate herself from her son's life despite his high level of criminal activity, she failed to take proper and reasonable precautions to ensure the safety and security of the USCS pistol assigned to her by leaving it in in her residence where her son would have access to it, and without authorization, she used law enforcement data bases to query names of family members. ***Mot. S/J***, Exh. 4, Decision Letter.

Special Agent Smartt also relies upon differential disciplinary treatment of other agents with problem children to show pretext. First, that evidence is of questionable relevance in light of Special Agent Smartt's admission that Adamson acted in good faith in imposing discipline against her. Second, assuming it is somehow relevant, the circumstances are distinguishable. Special Agent Smartt was not disciplined because of her son's criminal activity but because of her failure to separate herself from him.

In order to show pretext, Special Agent Smartt also attempts to show that the decision of Mr. Adamson, who she concedes acted without discriminatory animus, was adversely affected by two individuals that harbored discriminatory animus toward Blacks. Special Agent Smartt contends that Mr. Adamson's decision was influenced by both Special Agent Robert Butler and SAC Leonard Lindheim. Special Agent Butler worked in the San Antonio area with Special Agent Smartt, but he did not have any supervisory authority over her. As a Special Agent in Charge, Lindheim was the highest ranking Special Agent in the entire District and he was Special Agent Smartt's third line

supervisor. The Court may impute a discriminatory or retaliatory motive to Mr. Adamson as the decision-maker if an employee with a discriminatory motive manipulates or unduly influences the decision-making process. ***Willis v. Marion Cty. Auditor's Office***, 118 F.3d 542, 547 (7th Cir. 1997).

Special Agent Smartt contends that she does not have to prove that biased or untrue information actually influenced the decision of Mr. Adamson. The Court disagrees. If the information was unbiased and true, then there can be no showing of pretext because Mr. Adamson's decision would not be considered to have been adversely affected. If the information was biased or untrue, but was not relied upon by Mr. Adamson, then pretext cannot be established because Mr. Adamson was insulated from any attempt to adversely influence his decision. ***Willis***, 118 F.3d at 547.

In addressing this issue in ***Long v. Eastfield College***, the Fifth Circuit noted that there are two distinct lines of cases addressing the issue of employer liability for employment decisions based on the complaints or recommendations of other employees. 88 F.3d 300, 306 (5th Cir.1996). "The first line of cases involves employer liability for actions, complaints, and recommendations of ordinary employees." ***Id.*** The Fifth Circuit noted that an employer is not liable under Title VII for an employment decision based on a false complaint of an ordinary employee if the employer reasonably believed the allegation and acted on it in good faith. ***Id.*** In such cases, the wrongful intent of the ordinary employee is not imputable to the employer because ordinary employees do not have control over the employment status

of co-employees. ***Long***, 88 F.3d at 306. The other line of cases involves employer liability for the actions, complaints and recommendations of supervisory employees. An employer is liable under Title VII for an employment decision made by a supervisory employee, where the supervisory employee was an agent of the employer with regard to the employment status of the plaintiff. ***Id.*** at 306-307. The wrongful intent of the supervisory employee is properly imputable to the employer in such a case because the supervisory employee's actions are made in furtherance of the employer's business. Thus, if a plaintiff can establish a causal link between the allegedly discriminatory or retaliatory intent of a supervisory employee and the disputed employment decision, then the plaintiff can overcome a motion for summary judgment as to claims of discrimination or retaliation. ***Id.*** at 307.

In regard to Special Agent Butler, Special Agent Smartt contends that he provided biased or untrue information to the Special Agents conducting the Internal Affairs investigation of her. According to the holding in Long, the wrongful intent of a co-employee such as Special Agent Butler could not be imputable to the defendant. Special Agent Smartt's response does not identify the allegedly biased or untrue information that Special Agent Butler provided to the Internal Affairs investigators. The motion for summary judgment provides Special Agent Smartt's answer to an interrogatory that asked her to describe the allegedly biased or untrue information provided by Special Agent Butler. Her answer consisted of seven items.

It is undisputed that Special Agent Smartt and Special Agent Butler did not get along and did not care for each

other. Therefore, the Court assumes for the sake of analysis that the information provided by Special Agent Butler was biased and untrue. There is evidence that Special Agent Butler criticized Special Agent Smartt because of her lack of productivity. ***Mot. S/J***, Exh. 8, J. Cisneros Declr. The Court notes that the information Special Agent Butler provided to the Internal Affairs investigation focused on Special Agent Smartt's son's criminal activity, which was extensive. However, Special Agent Smartt has not shown that Special Agent Butler's actions in providing information to the Internal Affairs investigation were motivated by a discriminatory animus.

Special Agent Smartt stresses that Special Agent Butler had a dislike for Blacks, evidenced by his use of the "N-word" on one occasion in reference to a DEA Special Agent. In order for such a remark to be considered sufficient evidence of discrimination, it must be (1) related to the protected class of persons at issue; (2) proximate in time to the disputed employment decision; (3) made by an individual with authority over the employment decision at issue; and (4) related to the employment decision at issue. ***Sreeram v. Louisiana St. Univ. Med Ctr. – Shreveport***, 188 F.3d 314, 320 (5th Cir.1999). The witness who heard the statement could not he sure that Special Agent Butler actually made it. Also, Special Agent Smartt failed to show when Special Agent Butler allegedly made the remark, thus she failed to show that it was proximate in time to the disputed employment decision. She also failed the show that Special Agent Butler had any authority over her. It is clear that the remark by Special Agent Butler was not related to the employment decision at issue because it was made it in regard

to a DEA Special Agent. Therefore, the alleged remark by Special Agent Butler fails to satisfy Special Agent Smartt's burden of showing that Special Agent Butler's actions in providing information to the Internal Affairs investigators was motivated by a discriminatory animus.

Special Agent Smartt faces another obstacle in attempting to prove that Mr. Adamson relied on information provided by Special Agent Butler. First, it is beyond dispute that the criminal activity of Special Agent Smartt's son was a significant problem. Special Agent Smartt concedes that the USCS was aware of her son's criminal activity irrespective of any information that Special Agent Butler provided. In her response, Special Agent Smartt stated that she always informed her supervisors and the police of any illegal activities that her son was involved in. Also, Mr. Adamson's decision letter focused on Special Agent Smartt's decision to allow her adult son to continue to live with her long after he stole her pistol. ***Mot. S/J***, Exh. 4, Decision Letter. Thus, Special Agent Smartt, rather that Special Agent Butler, was the source of the information regarding Special Agent Smartt's son that appears to be pivotal in Mr. Adamson's letter, namely that Special Agent Smartt failed to disassociate herself from her son. For these reasons, the motion for summary judgment should be granted to the extent that Special Agent Smartt's discrimination claim is based on the actions of Special Agent Butler.

In regard to the actions of SAC Lindheim, Special Agent Smartt contends that he told Mr. Adamson that she had to be transferred, stating reasons that were false. Thus, Special Agent Smartt concludes that SAC Lindheim influenced Mr.

Adamson's decision to suspend and transfer her. Special Agent Smartt contends that she can prove that SAC Lindheim acted with a discriminatory and retaliatory motive because he disliked Blacks and he knew about her prior EEO activity.

It is undisputed that Mr. Adamson called SAC Lindheim on August 27, 1996, and during the conversation, SAC Lindheim told Mr. Adamson that Special Agent Smartt must be transferred. The Court assumes for the purposes of analysis that the reasons given by SAC Lindheim were false. According to Mr. Adamson's declaration, he called SAC Lindheim to confirm that he had "made the correct decision regarding Special Agent Smartt, i.e., that she needed to be transferred away from her San Antonio duty station, and that her employment with the Customs Service should not be terminated because she had potential to be a successful Special Agent elsewhere." ***Mot. S/J***, Exh. 3, Adamson Declr. Mr. Adamson also stated that nothing that SAC Lindheim told him changed his mind about the decision he had already made. ***Id.***

As evidence of influence, Special Agent Smartt relies on the timing of the conversation in August 1996, which was long before the February 1997 issuance of the decision letter. Mr. Adamson explains that he sent the decision letter to the USCS Office of Human Resources on September 5, 1996, but that was still after the conversation with SAC Lindheim. Considering that the Court must view the evidence in the most favorable light to the plaintiff, the Court is unable to determine in the context of this motion whether SAC Lindheim may have influenced Mr. Adamson. Also, according to the holding in ***Long***, any wrongful intent on

the part of SAC Lindheim is imputable to defendant because he is a supervisory employee. Therefore, the Court finds that there is a question of material fact regarding whether SAC Lindheim influenced Mr. Adamson.

Any such influence that SAC may have had on Mr. Adamson's decision must be shown to have been motivated by discrimination or retaliation in order for Special Agent Smartt to overcome summary judgment. Special Agent Smartt contends that SAC Lindheim was known to be hostile toward Blacks. Special Agent Smartt's evidence of SAC Lindheim's allegedly discriminatory intent consists of an excerpt of a transcript of an EEO proceeding before an administrative law judge. ***Response***, Exh. I.[3] The excerpt does not identify the deponent. According to Special Agent Smartt's response, the excerpt is of testimony of James Kirby O'Neal. Mr. O'Neal worked with SAC Lindheim from 1991 to 1993. Response, Exh. I, p. 86.

In his testimony, Mr. O'Neal stated that, from statements made by SAC Lindheim some time during the 1991-93 period, he concludes that SAC Lindheim had a strong dislike for Blacks. ***Id.*** at p. 87. Thus, the excerpt does not provide evidence of any statements that are proximate in time to Special Agent Smartt's 1997 suspension and transfer. Also, none of the statements could be shown to be related to Special Agent Smartt's suspension and transfer. Therefore, such evidence is insufficient to prove that SAC Lindheim acted with a discriminatory intent.

---

3. Special Agent Smartt's sur-reply provides the proper authentication for such document, which undermines defendant's objection to that evidence on the basis of lack of authentication.

Appendix B

Special Agent Smartt also contends that SAC Lindheim acted with retaliatory intent when he talked to Mr. Adamson because he knew of her prior EEO activity. In an ordinary retaliation claim, the plaintiff would have to show that her employer would not have taken the adverse employment action "but for" the plaintiff's participation in the protected activity. ***Scrivner v. Socorro Indep. Sch. Dist.***, 169 F.3d 969, 972 (5th Cir.1999). Since Special Agent Smartt contends that SAC Lindheim's allegedly retaliatory intent motivated him to influence Mr. Adamson's decision, the burden of proof must vary slightly. Thus, to carry her ultimate burden of proof in regard to the retaliation claim, Special Agent Smartt must show that, "but for" her January 22, 1996 complaint of discrimination, SAC Lindheim would not have made the statement to Mr. Adamson that Special Agent Smartt had to be transferred.

As noted earlier, Special Agent Smartt filed an administrative complaint of discrimination on January 22, 1996, just over seven months before the conversation between Mr. Adamson and SAC Lindheim. Certainly, seven months is sufficient proximity in time between the protected activity and the disputed conversation to establish a prima facie case of retaliation. However, that evidence alone does not require denial of the motion for summary judgment as to the retaliation claim because it is more difficult to satisfy the ultimate burden of proof. ***See Long***, 88 F.3d at 305 n.4 (the standard for establishing the "causal link" element of the prima facie case is much less stringent than the ultimate burden of proving that the protected activity was a "but for" cause of the adverse employment decision). Consideration of the proximity in time is part of the Court's analysis, but it

is not conclusive as to the determination of retaliation. ***Shirley v. Chrysler First, Inc.***, 970 F.2d 39, 44 (5th Cir. 1992). Instead, the proximity in time is properly considered as one of the elements in the entire calculation of whether there was a causal connection between the protected activity and the disputed action. ***Id.***

Special Agent Smartt has proffered no evidence of retaliation other than the proximity in time. Other factors that can be balanced with the factor of proximity include (1) the Internal Affairs investigation was initiated pursuant to USCS policies after Special Agent Smartt reported the theft of her pistol; (2) a USCS Special Agent in Louisiana, whose intent has not been impugned, recommended that Special Agent Smartt be suspended for 30 days and transferred; (3) SAC Lindheim did not contact Mr. Adamson to volunteer his opinion; (4) although SAC Lindheim stated to Mr. Adamson that Special Agent Smartt had to be transferred, it is undisputed that he made a positive remark about her, namely that she has the potential to be a good Special Agent elsewhere; (5) after Mr. Adamson received SAC Lindheim's opinion, Special Agent Smartt received a penalty that was less severe than was recommended by the Special Agent in Louisiana; (6) Mr. Adamson reviewed every document (over 500 it in number) that was included in the record at the time he made his decision[4]; and (7) Mr.

---

4. Mr. Adamson's review of the entire record supports a finding that he conducted an independent investigation despite the recommendation of SAC Lindheim because there is no summary-judgment evidence to show that the record was prepared under the direction of SAC Lindheim. ***Long***, 88 F.3d at 307 n.8.

(Cont'd)

Adamson made his decision after receiving an oral reply from Special Agent Smartt and her counsel, neither of whom asserted that he should guard against any influence from SAC Lindheim because of his retaliatory intent. Considering all these factors, the Court finds that there is no conflict in substantial evidence that would create a jury question on the issue of retaliation. ***See Shackelford v. Deloitte & Touche, LLP***, 1999 WL 728105, *3 (5th Cir.1999) ("Once a Title VII case reaches the pretext stage, the only question on summary judgment is whether there is a conflict in substantial evidence to create a jury question regarding discrimination."). For these reasons, the motion for summary judgment should be granted as to the discrimination and retaliation claims that are based on the actions of SAC Lindheim.

Conclusion

The defendant's motion for summary judgment shall be **GRANTED** it in its entirety, and this case shall be **DISMISSED**.

It is so **ORDERED.**

SIGNED this 26th day of October, 1999.

s/ John W. Primomo
JOHN W. PRIMOMO
United States Magistrate Judge

(Cont'd)
Special Agent Smartt acknowledges that the causal link between the allegedly retaliatory intent of SAC Lindheim and her suspension and transfer would be broken if the deciding official, Mr. Adamson, conducted an independent investigation. ***See Long***, 88 F.3d at 307.

Appendix B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL NO. SA-98-CA-990-JWP

AZALEA SMARTT,

Plaintiff,

v.

ROBERT E. RUBIN,
Secretary of the Treasury,

Defendant.

JUDGMENT

In accordance with the Order being entered contemporaneously herewith;

It is **ORDERED** that judgment be entered for defendant and that plaintiff's claims of discrimination be **DISMISSED WITH PREJUDICE.** Costs are taxed against plaintiff.

It is so **ORDERED.**

SIGNED this 26th day of October, 1999.

s/ John W. Primomo
JOHN W. PRIMOMO
United States Magistrate Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION, REGARDING POST-JUDGMENT MOTIONS DATED AND FILED JANUARY 4, 2000

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL NO. SA-98-CA-990-JWP

AZALEA SMARTT,

Plaintiff,

v.

ROBERT E. RUBIN,
Secretary of the Treasury,

Defendant.

ORDER

Before the Court are two post-judgment motions filed by plaintiff Azalea Smartt: *Plaintiff's Fed.R.Civ.P. 60 Motion For Reconsideration* (docket no. 50) and *Plaintiff's Motion To Deny Defendant Costs, Or In The Alternative, Stay Taxing Of Costs Pending Plaintiff's Motion For Reconsideration And Appeal* (docket no. 51). Plaintiff seeks reconsideration of the order granting defendant's motion for summary judgment on the basis of newly discovered evidence. Plaintiff's request that the Court deny defendant costs is

based on the alleged newly discovered evidence. Relief under Rule 60(b) is allowed for newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)[1]. The Court finds that plaintiff failed to use due diligence in obtaining the information that plaintiff seeks to use as the basis for each type of requested relief. Therefore. the motions will be denied.

Background

On October 26, 1999, the Court entered an Order granting defendant's motion for summary judgment. Docket no. 46. Plaintiff seeks reconsideration of the October 26 Order and denial of the award of costs against plaintiff on the basis of newly-discovered evidence. Plaintiff's motion for reconsideration contains a November 11, 1999 affidavit from Mr. Walter Biondi that indicates that SAC Leonard Lindheim, one of plaintiff's supervisors, was being investigated for race discrimination in 1996, which is the year the discrimination against plaintiff allegedly took place. ***Mot. Reconsid.***, Exh. B, Biondi Aff. Plaintiff contends that defendant withheld information regarding whether any of the decision-makers or any of plaintiff's supervisors had been investigated for race discrimination. Plaintiff seeks relief under Rule 60, arguing that defendant violated his disclosure obligations under Rule 26 and a specific request for production of documents.

---

1. Rule 59(b) requires that a motion for new trial be filed within 10 days after the court enters its judgment.

Appendix C

Discussion

Plaintiff correctly points out that Rule 60 provides that the Court may relieve a party from a final judgment if there is newly-discovered evidence which, by the use of due diligence, could not have been discovered in time to move for a new trial under Rule 59(b). Fed.R.Civ.P. 60(b). Plaintiff contends that she exercised due diligence in attempting to obtain documents pertaining to SAC Lindheim.

In attempting to establish due diligence, plaintiff contends that the mandatory disclosure requirement of Rule 26 imposed an obligation on defendant to come forward with the disputed evidence showing a discriminatory intent on the part of SAC Lindheim. Rule 26 provides that a party shall , without awaiting a discovery request, provide to other parties the identification of persons with knowledge of relevant facts, and a copy or description of all documents that are relevant to the disputed facts alleged with particularity in the pleadings. Fed. R. Civ. P. 26(1) (A&B). The District Judges of the Western District of Texas unanimously voted to opt-out of the mandatory disclosure requirement as set out in Rule 26. Local Rule CV-16(c) Thus, Rule 26 did not impose an obligation on defendant to disclose the disputed evidence.

Plaintiff also asserts that a specific request for production propounded on April 28, 1999, requested the documents at issue. That request for production requested "all documents prepared by or on behalf of any expert witness and/or investigator relating to the claims that are the subject of this action." ***Mot. Reconsid.***, Exh. C, p. 3. Plaintiff contends that

the request for production is broad enough to include investigatory documents as to SAC Lindheim because he was named in the complaint as an individual who discriminated against plaintiff. Plaintiff is incorrect because the documents sought were not created for the purpose of investigating plaintiff's claims. The documents plaintiff seeks purportedly show that SAC Lindheim used the "N-word" as recent as 1996, whereas evidence previously presented showed that he used the derogatory term as recent as 1993. The Biondi affidavit does not reflect that SAC Lindheim was being investigated regarding use of the derogatory term with respect to plaintiff. Instead, Biondi states that SAC Lindheim was being investigated for his use of the derogatory term in the presence of Mr. Biondi in regard to Blacks in general.

Plaintiff seeks to use documents of that separate investigation, which did not involve plaintiff, to support her claim of discrimination in this case. The Court finds that the request seeks production as to documents from any expert or investigator retained for the purpose of reviewing this case. The Court also finds that the request for documents from an expert witness and/or investigator relating to the claims that are the subject of this action is not broad enough to include documents pertaining to an investigation that was not based on plaintiff's case but regarded a supervisor's use of a derogatory term near the time of the events in question in this case. As a result, plaintiff's April 28, 1999 request for production of documents did not impose a requirement on defendant to disclose documents regarding investigations of SAC Lindheim apart from this case.

Appendix C

In order to require disclosure of the type of documents sought by plaintiff at this time, plaintiff should have made a specific request for information regarding whether any of the decision-makers or any of plaintiff's supervisors had been investigated for race discrimination. Plaintiff could have also deposed SAC Lindheim regarding the matters that are addressed in the documents sought by plaintiff. Plaintiff never deposed SAC Lindheim.[2] The Court finds that plaintiff has failed to establish that Biondi's testimony pertaining to a race discrimination investigation of SAC Lindheim is newly-discovered evidence which, ***by the use of due diligence***, could not have been discovered in time to move for a new trial under Rule 59(b).

Even if plaintiff could show that the evidence at issue could not have been timely discovered by the use of due diligence, granting of the requested relief would be improper because the disputed information would not change the outcome of the ruling on the motion for summary judgment. Plaintiff points out that the October 26, 1999 Order granted summary judgment because evidence of SAC Lindheim's racially derogatory statements to James O'Neal during the 1991-1993 period were not proximate in time to plaintiff's 1997 suspension. Thus, plaintiff concludes that summary judgment is inappropriate because of newly-discovered evidence showing that SAC Lindheim made derogatory remarks about Blacks in 1996.

---

2. Plaintiff moved to compel the deposition of SAC Lindheim, but the Court denied the motion because (1) plaintiff filed the motion over two months after the close of discovery, and (2) plaintiff failed to use due diligence in obtaining the deposition before the close of discovery. Docket no. 38.

Appendix C

Plaintiff's argument fails to point out another reason supporting the finding that the evidence was insufficient to prove that SAC Lindheim acted with a discriminatory intent, i.e., that none of the statements at issue could be shown to be related to plaintiff's suspension and transfer. In order for a remark to be considered sufficient evidence of discrimination, it must be (1) related to the protected class of persons at issue; (2) proximate in time to the disputed employment decision; (3) made by an individual with authority over the employment decision at issue; and (4) related to the employment decision at issue. ***Sreeram v. Louisiana St. Univ. Med. Ctr. – Shreveport***, 188 F.3d 314, 320 (5th Cir. 1999). According to the Biondi affidavit, SAC Lindheim made a derogatory comment about Blacks in general. Thus, proof that SAC Lindheim made such a comment in 1996 would be more proximate in time as plaintiff asserts, but plaintiff still fails to show that SAC Lindheim made any derogatory comment related to the employment decision at issue.

Other factors that can be balanced with the factor of proximity include (1) the Internal Affairs investigation was initiated pursuant to USCS policies after Special Agent Smartt reported the theft of her pistol; (2) a USCS Special Agent in Louisiana, whose intent has not been impugned, recommended that Special Agent Smartt be suspended for 30 days and transferred; (3) SAC Lindheim did not contact Mr. Adamson to volunteer his opinion; (4) although SAC Lindheim stated to Mr. Adamson that Special Agent Smartt had to be transferred, it is undisputed that he made a positive remark about her, namely that she has the potential to be a good Special Agent elsewhere; (5) after Mr. Adamson

received SAC Lindheim's opinion, Special Agent Smartt received a penalty that was less severe than was recommended by the Special Agent in Louisiana; (6) Mr. Adamson reviewed every document (over 500 it in number) that was included in the record at the time he made his decision; and (7) Mr. Adamson made his decision after receiving an oral reply from Special Agent Smartt and her counsel, neither of whom asserted that he should guard against any influence from SAC Lindheim because of his retaliatory intent.

Mr. Adamson's review of the entire record supports a finding that he conducted an independent investigation despite the recommendation of SAC Lindheim. Biondi's testimony merely establishes the existence of a stray remark by SAC Lindheim, unrelated to plaintiff, which remark is insufficient to overcome overwhelming evidence of defendant's non-discriminatory rationale. ***Sreeram***, 188 F.3d at 320. Even if, as plaintiff notes the court found, a genuine issue of fact exists as to SAC Lindheim's influence of Adamson's decision, there is no genuine issue of fact as to the existence of discriminatory motive behind that influence. Therefore, the newly-discovered evidence cannot establish, that SAC Lindheim acted with discriminatory intent.[3] For these reasons, the motions under consideration shall be **DENIED**.

---

3. Plaintiff does not assert that the newly-discovered evidence would establish a retaliatory intent.

Appendix C

It is so **ORDERED.**

SIGNED this 4th day of January, 2000.

s/ John W. Primomo
JOHN W. PRIMOMO
United States Magistrate Judge

APPENDIX D — MOTION TO SUPPLEMENT RECORD DATED JULY 31, 2000

No. 00-50061

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AZALEA SMARTT,

Plaintiff-Appellant,

v.

LAWRENCE H. SUMMERS, Secretary of the U.S. Department of Treasury, in his official capacity,

Defendant-Appellee.

COMBINED APPEAL FROM UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF TEXAS, SAN ANTONIO'S ORDER GRANTING DEFENDANT SUMMARY JUDGMENT AND DENYING APPELLANT'S MOTION FOR RECONSIDERATION AND MOTION TO DENY COSTS

MOTION TO SUPPLEMENT RECORD

DAVID L. ROSS
ROSS, ROSE & HAMMILL, LLP
8393 Wilshire Boulevard, Suite 634
Beverly Hills, CA 90211
(323) 653-7724

Attorney for Appellant

July 31, 2000

Appendix D

Pursuant to Fed. R. App. P. 10(e), Appellant respectfully moves the Court to supplement the record with a Department of the Treasury United States Customs Service Internal Affairs Report of Investigation, File ID 199503623, titled Lindheim, Leonard. *See* Exhibit A. Appellant needs to move for supplementation because the document was only published April 5, 2000 and Appellant only recently received the synopsis copy herself. The document is relevant to Appellant's appeal because part of her appeal deals with Appellee's maintenance of documents that related to Lindheim's racial animus that Appellee failed to inform Appellant about during the course of this case at the district court level. Additionally, the document clearly shows that Lindheim was actively exhibiting racial animus against blacks when he injured Appellant, a fact relevant to Appellant's claim of discrimination.

A court of appeals will not "ordinarily enlarge the record on appeal to include material not before the district court." *Kemlon Products and Development Co. v. United States*, 646 F.2d 223 (5th Cir. 1981). However, a court of appeals has the discretion to consider evidence not before the district court if such an exercise would further "the interests of justice [and result in] the efficient use of judicial resources." *Gibson v. Blackburn*, 744 F.2d 403, 405 (5th Cir. 1984).

Presently, the admittance of the Investigation Report synopsis would further the interests of justice because it would allow the Court to view evidence that was not capable of being reviewed by the district court when it ruled. Moreover, as explained more fully in Appellant's Reply Brief, this evidence shows that Leonard Lindheim called

blacks "niggers" and told racist jokes, a fact Appellee knowingly kept from Appellant. Such a review would result in the efficient use of judicial resources, as this Court would have the opportunity to review the evidence in making its ruling on the appeal, just as the district court would have had. Moreover, remanding the case back to the district court would only prolong this appeal, which is already a consolidated appeal consisting of two appeals from the same district court. As such, Appellant respectfully asks this Court to admit this new evidence into the record so that it may fully review all relevant evidence regarding Appellant's case.

Dated: July 31, 2000

Ross, Rose & Hammill, LLP

By: s/ David L. Ross
DAVID L. ROSS, Attorneys for
AZALEA SMARTT, Appellant

Appendix D

EXHIBIT A

IA SENSITIVE

DEPARTMENT OF THE TREASURY
UNITED STATES CUSTOMS SERVICE

REPORT OF INVESTIGATION

1. TECS ACCESS CODE: 3

2. PAGE: 1

3. FILE ID: 199503623

4. TITLE: LINDHEIM, LEONARD/
AGNT/RETALIATION/
TEXAS TX

5. FILE STATUS: CLOSING RPT

6. REPORT DATE
04052000

7. ASSIGN DATE
10031994

8. CLASS
3

9. FILE DESC CODES
37C 399 390 004 39B

Appendix D

10. RPT NBR.
001

* * *

13. TYPE OF REPORT:
REDBOOK

FINAL RESOLUTION:
SUBSTANTIATED

TOPIC: ALLEGED DISCRIMATORY REMARKS MADE BY SAIC LINDHEIM

14. SYNOPSIS:

On June 8, 1999, the Inspector General returned the matter of SAC Leonard LINDHEIM allegedly making discriminatory statements (from information received in 1996) to the U.S. Customs Service for action. In 1996, Ann Sullivan, Associate Chief Counsel, Boston alleged that SAC LINDHEIM made admissions to her of telling racial jokes and use of the word "nigger". Statements of two witnesses allegedly confirmed LINDHEIM's use of racial epithets.

While all the evidence collected during this investigation does not support the allegation, the 1996 contemporaneous notes of Ann Sullivan and statements of several witnesses does. Therefore the RAC-IA, Hoboken, finds that the allegation that SAC LINDHEIM made discriminatory statements is substantiated.

Appendix D

15. DISTRIBUTION:
NK

16. ORIGINATOR: COSCHIGNANO ANNA MARIA D
(TITLE) CRIM INVSTGR

17. APPROVED BY: GARSH STEVEN J
(TITLE) CRIM INVSTGR

18. ORIGIN OFFICE: NK NEWARK

19. PHONE: 201 653 1901

20. TYPIST: WHYTE

IA SENSITIVE

THIS DOCUMENT, LOANED TO YOU FOR OFFICIAL USE ONLY, REMAINS PROPERTY OF THE US CUSTOMS SERVICE. ANY FURTHER REQUEST FOR DISCLOSURE OF THIS DOCUMENT OR INFORMATION CONTAINED HEREIN SHOULD BE REFERRED TO HEADQUARTERS, US CUSTOMS SERVICE TOGETHER WITH A COPY OF THE DOCUMENT.

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT GRANTING MOTION TO SUPPLEMENT RECORD DATED AND FILED SEPTEMBER 6, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-51054
Consolidated With
Case No. 00-50061

AZALEA SMARTT

Plaintiff – Appellant

v.

LAWRENCE H SUMMERS, Secretary of United States Department of Treasury, in his Official Capacity as Agency Head

Defendant – Appellee

Appeals from the United States District Court for the Western District of Texas, San Antonio

ORDER:

IT IS ORDERED that the appellant's motion to supplement the record on appeal with a Department of the Treasury United States Customs Service Internal Affairs Report of Investigation is granted.

s/ Edith H. Jones
EDITH H. JONES
UNITED STATES CIRCUIT JUDGE